UNTIED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

MIRIAM McKNIGHT,

Plaintiff,

v.

MEMORADDUM OF LAW IN SUPPROT OF THE CITY DEFENDANTS' RULE 56 MOTION FOR SUMMARY JUDGMENT
Civil Case No. 11-cv-6328

CITY OF ROCHESTER, NEW YORK
G. VASIL, M.NICHOLLS AND L. GRANDE,

Defendants.

MEMORANDUM OF LAW

Named Defendants City of Rochester, New York, Gregory Vasile, Michael Nicholls and Laura Grande (hereinafter "City Defendants") submit this Memorandum of Law in support of their Motion For Summary Judgment pursuant to F.R.C.P. Rule 56. Plaintiff initiated this action against the City Defendants. Plaintiff have asserts generic claims of malicious prosecution, trespass, false arrest, false imprisonment, negligent hiring and supervision, punitive damages and excessive force against all City. No particular facts are pled for any of the causes of action stated in the Complaint, for which it fails ultimately to state a valid cause of action. Additionally, no genuine issues of material fact exist in this record by which a jury could rule in favor of the Plaintiff. Therefore, Defendants' motion should be granted in its entirety.

PLAINTIFF'S COMPLAINT

Plaintiff filed her initial Complaint on June 30, 2011. The Plaintiff named the City

Defendants and the City Defendants finally answered by their Amended Answer on October 27, 2011.

STATEMENT OF FACTS

For a complete statement of the facts, the Court is respectfully referred to Defendants' Declaration of Undisputed Facts Pursuant to Rule 56, along with the Affirmation of John M. Campolieto with attached Exhibits A-F. Additionally, the Plaintiff filed a companion Motion for Summary Judgment and the City made additional arguments regarding this action in its Responsive Affirmation to the Plaintiff's Motion for Summary Judgment.

SUMMARY JUDGMENT STANDARD

Summary judgment pursuant to Federal Rule of Civil Procedure 56 is appropriate where admissible evidence in the form of affidavits, deposition transcripts, or other documentation demonstrates both the absence of a genuine issue of material fact and one party's entitlement to judgment as a matter of law. *Viola v. Philips Medical Systems of North America*, 42 F.3d 712, 716 (2d Cir. 1994). Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). When determining whether a genuinely disputed factual issue exists, a trial judge must bear in mind the actual quantum and quality of proof necessary to support liability or the substantive standards that apply to the case. *Id* at 254-255.

"Summary judgment should be used sparingly in cases where the material fact at issue is the defendant's intent or motivation, the plaintiff must nevertheless offer some concrete evidence in his favor, and is not entitled to trial simply because the determinative issue focuses upon the defendant's state of mind." *Dister v. Cont'l Group Inc.,* 859 F.2d 1108, 1114 (2d Cir. 1994). However, the existence of a mere scintilla of evidence in support of the nonmovant's position is insufficient to defeat the motion as there must be evidence upon which a jury could reasonably find for the nonmovant. *Anderson* at 242, 252.

I. THERE ARE NO FACTUAL ALLEGATIONS IN THE COMPLAINT AGAINST LIEUTENANT LAURA GRANDE

Plaintiff's Complaint fails to allege any facts upon which Lieutenant Grande can be held liable. Indeed, aside from naming her in the caption and again naming her in the causes of action, there are no mentions of Lieutenant Grande in the factual allegations in the Complaint. Additionally, Lieutenant Grande was not located at the scene of the arrest of the Plaintiff and never had interaction with her.

It is well settled law in this Circuit that, "Personal involvement of defendants in an alleged constitutional deprivation is a prerequisite to an award of damages under Section 1983." *Moffitt v. Town of Brookfield*, 950 F. 2d 880, 886 (2d Cir. 1991); *McKinnon v. Patterson*, 568 F. 2d 930, 934 (2d Cir. 1977). To the extent that officials are sued in their individual capacities, a claim will fail under 42 U.S.C § 1983 if there are no allegations of personal involvement. *Al-Jundi v. Estate of Rockefeller*, 885 F. 2d 1060 (2d Cir. 1989). While asserting a claim against an employee in his official capacity is equivalent to asserting a claim against the municipality itself, individual liability under federal law depends on the level of personal involvement and cannot attach under traditional notions of respondeat superior. *Id.*

II. DEFENDANTS HAD PROBABLE CAUSE, BASED ON THE ACTIONS OF THE PLAINTIFF, TO ARREST, WHICH ESTABLISHES AN ABSOLUTE DEFENSE TO PLAINTIFF'S FALSE ARREST/FALSE IMPRISONMENT CLAIMS.

False arrest and false imprisonment cases are evaluated under the same legal standard in NewYork. *Singer v. Fulton County Sheriff,* 63 F.3d 110, 118 (2d Cir., 1995). "The existence of probable cause to arrest constitutes justification and is a complete defense to an action for false arrest, whether the action is brought under state law or under § 1983." *Weyant v. Okst*, 101 F.3d 845, 852 (2d. Cir. 1996). Probable cause to arrest exists where an officer has knowledge or reasonably trustworthy information sufficient to believe that the individual arrested committed a crime. *Caldarola v. Calabrese*, 298 F. Supp.2d 156 (2d Cir. 2002) "The probable cause determination requires the court to consider ***the facts available to the officer at the time of, and immediately prior to the arrest.***" (Emphasis added). *Id*. "Probable cause must be evaluated in light of the facts available to the arresting officer at the time of the arrest." *Ricciuti v. N.Y.C. Transit Authority*, 124 F. 3d 123, 128 (2d. Cir. 1997). Moreover, police officers may have probable cause to arrest even if information used as a basis for making an arrest is false, as long as it was reasonable to rely on that information. *Bernard v. United States*, 25 F.3d 98, 103 (2d. Cir. 1994). Furthermore, a criminal disposition in favor of a plaintiff does not attenuate the existence of probable cause at the time of arrest. *Harris v. County of Nassau, et al.,* 581 F. Supp. 2d 351, 355 (E.D.N.Y 2008) citing *Caldarola v. Calabrese*, 298 F.3d 156, 161 (2d Cir. 2002).

The undisputed facts in this matter are that prior to plaintiff's arrest, Defendant Officers Vasile observed Plaintiff attempting to remove crime scene security tape, that she told Officer Vasile that the crime scene security tape, that he was putting around the scene of a double stabbing, would not stay up and that she struggled with him while he was attempting to arrest her. Sergeant Nicholls did not arrest the plaintiff nor handcuff her and as such was not involved in the act of arresting and detaining her. Sergeant Nicholls attempted to assist Officer Vasile as he was arresting the struggling Plaintiff. Sergeant Nicholls did pepper spray the Plaintiff to subdue her so that she could be handcuffed and arrested by Officer Vasile without further incident.

Sergeant Nicholls testified that the pepper spray stopped the Plaintiff from being aggressive and that it is a safe and effective in assisting officers during confrontations . Also, Sergeant Nicholls testified that part of the issue with the use of pepper spray and the arrest of Plaintiff was that the Rochester Police Department was in a chaotic scene investigating a double stabbing. Pursuant to the doctrine specified by the Southern District Court in *Smith v. City of New York*, 2010 U.S. Dist. LEXIS 88774, (See also *Covington v. City of New York*, 171 F.3d 117 (2d Cir. 1999), 1999 U.S. App. Lexis 4365), the presence of probable cause is a complete defense to Section 1983 violations and State Law violations

Plaintiff must show that police conduct deviated "egregiously from statutory requirements and accepted practices in criminal cases." *Lee v. City of Mount Vernon*, 49 NY2d 1041. Based on the undisputed facts of this case, the Complaint fails to demonstrate such a departure from any articulated legal requirement and accordingly, should be dismissed in its entirety.

Claim of Malicious Prosecution Fails

Plaintiff accepted a plea bargain to the charge of Obstructing Governmental

Administration and Resisting Arrest during her judicial proceedings. The undisputed facts demonstrate that the criminal charges against plaintiff were dismissed conditioned upon to an adjournment in contemplation of dismissal under New York Law Criminal Procedure Law Section 170.55. Such a disposition does not constitute a favorable termination for purposes of a malicious prosecution claim**.** See, e.g. Green, 585 F.3d at 103-04 (holding that an adjournment **in** contemplation of dismissal is not a favorable termination for malicious prosecution claims); Rothstein v. Carriere, 373 F.3d 275, 287 (2d Cir. 2004) (holding that an adjournment **in** contemplation of dismissal pursuant to New York Criminal Procedure Law Section 170.55 extinguishes a malicious prosecution claim because it is a bargained-for dismissal of the criminal case); Fulton, 289 F.3d at 196 (recognizing that under New York law, an adjournment in contemplation of dismissal under New York Criminal Procedure Law Section 170.55 is not a favorable termination).

The Plaintiff's claim of malicious prosecution is vitiated by the plea bargain accepting an Adjournment in Contemplation of Dismissal in this action and the claim of malicious prosecution should be dismissed.

III. DEFENDANTS, VASILE AND NICHOLLS ARE ENTITLED TO QUALIFIED IMMUNITY

“The defense of qualified immunity shields government actors from liability if they did not violate clearly established law, or if it was objectively reasonable for such actors to believe that their actions did not violate clearly established law.” *Hernandez v. City or Rochester*, 260 F. Supp. 2d 599, 612 (W.D.N.Y, 2003) citing *Patel v. Searles*, 305 F.3d

130, 135 (2d Cir. 2002). "In a false arrest context, an individual officer is entitled to qualified immunity if: '(1) it was objectively reasonable for the officer to believe there was probable cause to make the arrest, or (2) reasonably competent police officers could disagree as to whether there was probable cause to arrest'" *Hernandez* at 613 citing *Ricutti v. N.Y.C Transit Authority*, 124 F.3d 123, 128 (2nd Cir., 1997). "In a case alleging false arrest, qualified immunity exists where the defendant police officer had ***'arguable' probable cause to arrest***." (Emphasis added). *Harris v. County of Nassau, et al.,* 581 F. Supp. 2d 351, 356 (E.D.N.Y 2008) citing *Caldarola v. Calabrese*, 298 F.3d 156, 161 (2d Cir. 2002). "Officers action in arresting a plaintiff is objectively unreasonable only where they are "so lacking in indicia of probable cause" as to make belief in its existence unreasonable." *Fodelmesi v. Schepperly*, 1992 U.S. LEXIS 5021 (S.D.N.Y 1992). Therefore, if officers of reasonable competence could disagree on the legality of an arrest, defendant is entitled to judgment as a matter of law, even if probable cause did not exist. *Hernadez* at 613 citing *Cerrone v. Brown*, 246 F. 3d 194, 202 (2d. Cir 2001).

In the present matter there was probable cause to arrest Plaintiff based on the facts known and observed by City Defendants at the time of Plaintiff's arrest, which include but certainly are not the only actions/observation: 1)the attempt to remove crime scene security tape and 2)the attempt to prevent the Rochester Police Department from investigating and securing a crime scene involving a double stabbing and resisting arrest. Probable cause to arrest exists where an officer's information is derived from finding and witnessing evidence of a crime. *Smith v. City of New York*, 2010 U.S. Dist. LEXIS 88774.

Moreover, even if probably cause did not exist, the Court should find that based on the undisputed facts in the record, reasonable officers could disagree as to the legality of plaintiff's arrest as a matter of law. Because affecting an arrest is within defendants clearly defined responsibilities as members of the Rochester Police Department, qualified immunity attaches to defendants in this matter. Accordingly, the Complaint should be dismissed with prejudice.

IV. PLAINTIFF CANNOT ESTABLISH SUPERVISORY LIABILITY UNDER § 1983.

"A municipality can be held liable under § 1983 for the actions of its employees pursuant to official unconstitutional policies and customs." *Monell v. New York Dep't of Social Serv.,* 436 U.S. 658, 691-692 (1978). "Municipal liability under §1983 may be premised upon an officially promulgated policy; a custom or persistent practice; deliberately indifferent training that is the proximate cause of the violation of plaintiff's federally protected rights; or a single decision by an official with final decision-making authority." *Ryan v. City of Watertown*, 1998 U.S. Dist. LEXIS 15967 (N.D.N.Y, 1998).

Failure to train, supervise and discipline:

Plaintiff alleges that the City of Rochester failed "to adequately train, supervise, or discipline officers' Vasile and Nicholls prior to this incident. (Complaint, paragraph 24). However, Plaintiff neither makes specific allegations as to how defendants were trained and supervised, nor does he identify any deficiencies in training or supervision. Also, Plaintiff neither alleges nor can he show that "illegal practices", failure to train and/or supervise was the proximate cause of her arrest. The record is clear that plaintiff's arrest was instigated by her attempt to remove the crime scene security tape. (See Exhibit A, and Exhibit B, entire depositions). Plaintiff has not indicated any illegal or deficient practices in the Defendants procedures other than inflammatory allegations in the Complaint.

Moreover "[I]t is well settled in New York that a 'claim for negligent hiring or supervision can only proceed against an employer for an employee acting outside the scope of his employment.' Where an employee is acting within the scope of his employment, the employer's liability for his conduct is imposed by the theory of respondeat superior, and no recovery can be had against the employer for negligent hiring, training or retention." *Robinson v. County of Yates*, 2011 U.S. Dist. LEXIS 108449 (W.D.N.Y 2011) at *8-9 citing *Stokes v. City of New York*, 2007 U.S.Dist. LEXIS 32787 at 53-45. Plaintiff does not allege nor can he demonstrate that police investigators acted outside the scope of their employment in arresting and securing the Plaintiff from interfering in the police investigation of a double stabbing. Therefore, Plaintiff's claim for negligent training, supervision and retention should be dismissed entirely and with prejudice.

V. THERE IS NO COGNIZABLE CLAIM OF TRESPASS SPECIFIED IN THE COMPLAINT

The Plaintiff claims that the City Defendants trespassed on her property during their attempt to secure the crime scene of a double stabbing. The City Defendants were uniformed law enforcement officer acting in their official capacities as employees of the City of Rochester and the City of Rochester Police Department. They were investigating a double stabbing at 234 Pierpont Street and were privileged to act, as law enforcement officers, in securing the crime scene as they determined it to be. Lieutenant Grande stated with great specificity during her deposition that a crime scene is a fluid event which is determined by individual situations. In this case Officer Vasile determined that the Plaintiff's front porch was so close in proximity to the stabbing that crime scene security tape needed to be placed near or on the porch to sufficiently secure the crime scene.

The Plaintiff has alleged no semblance of the requirements for a cause of action for Trespass against a law enforcement officer acting in their official capacity. The City Defendants were engaged in a privileged action and not a trespass.

VI. USE OF EXCESSIVE FORCE HAS NOT BEEN PLED NOR ESTABLISHED WITH PARTICULARITY IN THE COMPLAINT

For a claim of excessive force to be actionable, a plaintiff must demonstrate that it was "objectively sufficiently serious or harmful." *United States v. Walsh*, 194 F.3d 37, 50 (2d Cir. 1999). Stated another way, "the force used by the defendant [generally] must be more than de minimis in order for the plaintiff's claim to be actionable." *Bell v. Chemung County*, 2006 U.S. Dist. LEXIS 22965, 2006 WL 839413, *3 (W.D.N.Y. 2006); *Romano v. Howarth*, 998 F.2d 101, 105 (2d Cir. 1993) (a de minimus use of force will rarely suffice to state a constitutional claim)). As the Supreme Court has acknowledged, "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates the Fourth Amendment." *Graham v. Connor*, 490 U.S. 386, 396 (1989).

Courts have long recognized that a police officer's right to make an arrest or investigatory stop "necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." *Graham v. Connor,* 490 U.S. at 396. "Because the test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application, however, its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.* (internal quotations omitted). A police officer's application of force is excessive if it is objectively unreasonable "in light of the facts and circumstances confronting [the officer], without regard to [the officer's] underlying intent or motivation." *Id.* at 397.

Based on the observations of Officer Vasile in watching the Plaintiff attempt to remove the crime scene security tape and Plaintiff's self avowed attempts to get away from the police officers when she was being arrested, probable cause existed for the arrest of the Plaintiff, and thus implicitly demonstrates that the officers were authorized to use some degree of force or the threat thereof to affect those arrests.

However, where, as here, there has been no injury or minor injury, courts have dismissed claims of excessive force. *See, e.g., Landy v. Irizarry,* 884 F. Supp.788, 799 n.14 (S.D.N.Y. 1999) (stating that an arrestee must prove some injury, even if insignificant, to prevail in an excessive force claim); *Murphy v. Neuberger,* 1996 WL 442797 at *8 (S.D.N.Y. 1996) ("Although the injuries suffered need not be permanent or severe to recover under an excessive force claim," a valid claim must allege physical injury. Allegations of being dehumanized are insufficient). Although a claim of excessive force may be established even if the victim does not suffer serious or significant injury, nontheless plaintiff must demonstrate that the amount of force used is more than de minimus, or involves force that is repugnant to the conscience of mankind. *United States v. Walsh*, 194 F.3d 37, 47 (2d Cir. 1999) (citation omitted).

Plaintiff alleges that she was struck in the body, pepper sprayed in the body and forcibly handcuffed and that as a result of these claims, Plaintiff claims that she suffered scarring, temporary blindness and sever pain in the eye.

Plaintiff does not allege any specific physical injuries or permanent injury as a result of the alleged excessive force and the Defendants statements of their actions all show incidental contact due to the effecting of the arrest

Courts have repeatedly dismissed claims in circumstances similar to these. *See. e.g., Rincon v. City of New York*, 2005 U.S. Dist. LEXIS 4335, at *11 (S.D.N.Y. 2005) (granting summary judgment dismissing excessive force claim where plaintiff treated only for swelling in right leg and wrist despite alleging that force of being thrown to ground caused "stitches on her leg [to] split open"); *Johnson v. Police Officer # 17969*, 2000 U.S. Dist. LEXIS 18521, 2000 WL 1877090, at *5 (dismissing excessive force claim where plaintiff alleged three injuries -- a contusion of the chest on the left rib cage, unspecified injuries to the right side of the face, and an unspecified injury to his left leg -- stemming from an officer wrestling the plaintiff to the ground during an arrest); *Jennejahn v. Vill. of Avon*, 575 F. Supp. 2d 473 (W.D.N.Y. 2008) (dismissing excessive force claim on summary judgment despite disputed issue as to amount of force used because officer's actions constituted de minimis use of force and there was no evidence arrestee suffered physical injury); *Mandina v. City of Yonkers*, 1998 U.S. Dist. LEXIS 14553, at *24-27 (S.D.N.Y. 1998) (granting summary judgment against pro se plaintiff who alleged that arresting officers used excessive force by pushing him into police car causing back injury where plaintiff had preexisting back injury and emergency room physician found no evidence of exacerbation or new injury); *Bradley v. Village of Greenwood Lake*, 376 F. Supp. 2d 528, 535 (S.D.N.Y. 2005) (granting summary judgment dismissing excessive force claim against arresting officer who kicked plaintiff in the stomach causing temporary nausea and an abdominal scratch); *Esmont v. City of New York*, 371 F. Supp. 2d 202, 213-15 (E.D.N.Y. 2005) (granting summary judgment dismissing excessive force claim where arresting officer caused plaintiff to bump her head as she was placed in patrol car, resulting in a headache; left her in hot patrol car for ten minutes, resulting in profuse sweating; and applied handcuffs too tightly, resulting in bruising, swelling and unsubstantiated claims of nerve damage); *Roundtree v. City of New York*, 778 F. Supp. 614, 622 (E.D.N.Y. 1991) (granting motion to dismiss excessive force claims where arresting officer pushed plaintiff into a patrol car causing him emotional pain and suffering; "to conclude that a 'push' that does not cause the slightest of physical injuries to the plaintiff is nonetheless an actionable use of excessive force would be to hold that any physical contact by an arresting officer with the arrested person is actionable . . . and would transform the constitutional wrong of excessive force in arrest into the common law tort of battery"); *Russo v. Port Auth*., 2008 U.S. Dist. LEXIS 79032 (E.D.N.Y. 2008) (claim dismissed where plaintiff claimed that police officer lifted his arms up high behind his back and then either threw them down or released them, causing plaintiff to falter and his neck to be jerked violently and causing plaintiff to cry out in pain exacerbating pre-existing back injuries, causing severe damage to plaintiff's neck and resulting in shingles, sleeplessness, extreme discomfort and worsening neurological problems).

Sergeant Nicholls was attempting to secure a crime scene involving two stabbings, he was working against a chaotic crowd and scene. He witnessed the officer assigned to roping off the chaotic scene struggling with the Plaintiff. He used sufficient and necessary force to subdue and arrest the Plaintiff in order to maintain the crime scene. The force used was arm stabilization of the Plaintiff and the use of pepper spray. Both were minimally used and effective in affecting the arrest of the Plaintiff. Because Plaintiff has not alleged specific physical injuries resulting from the alleged excessive force, the allegation of excessive force is not actionable. *See Williams v. City of New York*, 2007 U.S. Dist. LEXIS 55654 (S.D.N.Y. 2007).

VII. THERE CAN BE NO PUNITIVE DAMAGES AGAINST DEFENDANTS

The Complaint states separate causes of action against the City Defendants for punitive damages without specifying under what theory or statute such damages are sought.

The Supreme Court addressed the issue of punitive damages levied against a municipality in *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981), and held that “considerations of history and policy do not support exposing a municipality to punitive damages for the bad-faith actions of its official … we hold that a municipality is immune from punitive damages under 42 U.S.C. §1983.” *Id; see also, DiSorbo v. Hoy*, 343 F.3d 172, 182 (2d Cir. 2003) (“[P]unitive damages may not be awarded against a municipality under Monell”). “A claim against a government officer in his official capacity is, and should be treated as, a claim against the entity that employs the officer ….” *Mathie v. Fries*, 121 F.3d 808, 818 (2d Cir. 1997). Consequently, “punitive damages are not available against municipalities, or against defendants in their official capacities.” *Dorsett-Felicelli v. County of Clinton*, 2006 U.S. Dist. LEXIS 73362, 2006 WL 2792746 *2 (N.D.N.Y. 2006).

Further, there is no separate cause of action for punitive damages under New York law. *See, e.g., Martin v. Dickson*, 100 F. App'x 14, 16 (2d Cir. 2004) ("[T]here is no separate cause of action in New York for punitive damages."); *Paisley v. Coin Device Corp*., 5 A.D.3d 754 (2d Dep't 2004) ("We note that no separate cause of action for punitive damages lies for pleading purposes.") (citing *Crown Fire Supply Co. v. Cronin,* 306 A.D.2d 430, 431 (2d Dep't 2003).

CONCLUSION

Based upon the foregoing, Defendants respectfully requests that the Court grant their motion for Summary Judgment in its entirety and dismiss the Complaint with prejudice.

June 4, 2014

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